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October 22, 2015

SENT VIA EMAIL: CityAtty@springsgov.com

Wynetta Massey
Colorado Springs City Attorney
30 S. Nevada Ave., Suite 501
Colorado Springs, CO 80903

Re: Incarceration of poor people for failure to pay fines

Dear Ms. Massey,

The City of Colorado Springs, through its municipal court, is regularly and frequently sentencing impoverished Coloradans to jail when they are unable to pay their court-ordered fines.¹ As a matter of common practice, when faced with affirmative evidence that defendants were completely impoverished, the Colorado Springs Municipal Court has sent debtors to jail to trade their liberty for a \$50 per day credit toward fines owed to the court. This practice violates Colorado law and over forty years of clear precedent from the United States Supreme Court.

Since January 2014, the Colorado Springs Municipal Court has ordered hundreds of people to spend days, weeks, and in several cases, months in jail because they were too poor to pay. The vast majority of these debtors were sentenced to jail for ordinance violations that, by municipal law, are punishable by a fine only, not jail. Incarceration under these circumstances returns Colorado Springs to the days of debtors' prisons, which were long-ago abolished in this country.

The City of Colorado Springs must correct these illegal and ill-advised practices. To comply with federal and state law, the City must ensure that its municipal court stops jailing poor persons who are unable to pay court-ordered fines. In addition, the City must accept its responsibility to compensate individuals who have been unjustly and illegally incarcerated because of their poverty.

¹ In this letter, "fines" refers to any monetary obligation ordered by the court, including but not limited to fees, fines, and costs.

Colorado Springs Municipal Court is jailing indigent defendants when they are unable to pay fines, often resulting in jail sentences for non-jailable offenses.

In over 800 cases since January 2014,² the Colorado Springs Municipal Court has imposed a fine for a violation of a municipal ordinance and then converted the fine into what court documents label a “pay or serve” sentence. A “pay or serve” sentence orders that a defendant either pay the amount due or serve time in jail to “pay off” his or her sentence at a rate of \$50 per day.

The Municipal Court is imposing these pay-or-serve sentences on homeless or impoverished defendants who clearly have no ability to pay the court-ordered fine. In cases we have reviewed, the sentencing judge knew – both from records before the court and from an on-the-record colloquy with the defendant – that the defendants were penniless and could not pay the fine. Indeed, many of the pay-or-serve sentences are imposed on defendants convicted of offenses that are closely tied to homelessness or extreme poverty, such as panhandling or park curfew. For homeless and deeply impoverished people, who represent the vast majority of persons convicted of these offenses, a “pay or serve” sentence does not offer a choice. Because those individuals cannot “pay,” they must “serve out” their fine in jail at a credit of \$50 per day. Thus, for penniless defendants, a “pay-or-serve” sentence is a sentence to jail.

In fully 75% of the pay-of-serve sentences imposed, defendants were ordered to jail for non-jailable offenses – offenses that the Colorado Springs Municipal Code identifies as punishable only by a fine and never by jail. For example, the City code identifies its ordinances regulating soliciting charity near streets or highways and being in a park after closing time as non-jailable offenses punishable by, at most, a \$500 fine.³ Yet, since January 2014, the Colorado Springs Municipal Court has imposed over 200 pay-or-serve sentences for violation of the solicitation ordinance, and over 65 pay or serve sentences for park hours violations. The City’s court has sentenced well over a hundred people to days, weeks, and in some cases months in jail for supposedly non-jailable offenses when the defendants were too poor to pay the court-ordered fines.

Incarcerating indigent people when they cannot afford to pay a fine violates state and federal law.

The Colorado Springs Municipal Court violates the United States Constitution when it converts a fine to a jail sentence because the defendant is too poor to pay. Over forty years ago, the Supreme Court decided *Tate v. Short*, 401 U.S. 395 (1971), which is directly on point. In *Tate*, the petitioner owed \$425 in fines for traffic offenses which, by municipal law, were non-jailable – they were punishable only by a fine. Because of poverty, the petitioner was unable to pay. Pursuant to municipal law, the city court converted the fines into jail time and ordered the petitioner imprisoned until he had satisfied his debt at a rate of \$5 credit per day. The Supreme Court held that imprisoning a defendant who was unable to pay a fine violated the Equal Protection Clause. *Id.* at 398. The Court underscored that “the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” *Id.* A decade later,

² Our investigation, thus far, has been limited to individuals jailed due to their poverty since January, 2014.

³ See Colorado Springs Municipal Code Section 11.4.104 (listing Section 10.18.112 (solicitation near highways) and Section 4.2.102 (park hours) as non-jailable offenses punishable, at most, by a \$500 fine).

in *Bearden v. Georgia*, the Court unequivocally reaffirmed its holding in *Tate*, emphasizing that “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.” 461 U.S. 660, 667 (1983).

Colorado law provides equally strong protection against jailing an indigent debtor. The Colorado Constitution expressly forbids imprisonment for debt,⁴ and the Colorado Supreme Court has strongly condemned jailing indigent people who are too poor to pay a debt. Over two decades ago, it invalidated a “body execution statute” which authorized the imprisonment of a reckless tortfeasor who was unable to pay a judgment. *Kinsey v. Preeson*, 746 P.2d 542 (Colo. 1987). The court recognized that jailing an indigent defendant for failure to pay serves no legitimate purpose and instead irrationally punishes the poor for being poor. The court explained:

The purpose of the body execution statute, to coerce a judgment debtor into paying the judgment, cannot be effected against an indigent debtor. The only real effect of the body execution against an indigent debtor is that of punishment. Such a punishment can be avoided by a solvent debtor but becomes mandatory against an indigent debtor. Thus, the body execution statute is invidiously discriminatory and unconstitutional

746 P.2d at 550.⁵

In 2014, the Colorado legislature enacted legislation to protect impoverished defendants from being thrown in jail simply because they lacked the ability to pay a fine. House Bill 14-1061, which amended Section 18-1.3-702 of the Colorado Revised Statutes mandates: “When a defendant is unable to pay a monetary amount due without undue hardship to himself or herself or his or her dependents, the court shall not imprison the defendant for his failure to pay.” C.R.S. § 18-1.3-702(3)(a).⁶

By converting the fines of poor persons to jail sentences, the Colorado Springs Municipal Court is clearly violating the mandates of the United States Supreme Court, the Colorado Supreme Court, and Section 18-1.3-702 of the Colorado Revised Statutes.

⁴ “No person shall be imprisoned for debt.” Colo. Const., Art. II, Sec. 12.

⁵ Notably, the Colorado Supreme Court has made clear that the “constitutional provision against imprisonment for debt does not prohibit the punishment of a contempt by imprisonment for refusing to obey the lawful orders or decrees of court.” *Harvey v. Harvey*, 384 P.2d 265, 266 (Colo. 1963). In such a case, the defendant “is not imprisoned for debt, but because of his refusal to obey the lawful order of the court.” *Id.* However, it is well established that a court may not find an individual in contempt when he does not have the ability to comply with the court’s order. *See, e.g., Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011); *Hicks v. Feiock*, 485 U.S. 624, 638 n. 9 (1988); *Shillitani v. United States*, 384 U.S. 364, 371 (1966). Poor people who do not have the money to pay their fines do not have the ability to comply with the court’s order to pay and, therefore, cannot be found in contempt of court. *See, e.g., Turner*, 131 S. Ct. at 2511.

⁶ The Colorado Springs Municipal Court certainly has had notice of this new statute. In June, 2014, the ACLU sent the CSMC a letter detailing the requirements of the law.

The Colorado Springs Municipal Court also violates indigent defendants' Sixth Amendment right to appointed counsel.

By imposing “pay-or-serve” sentences for non-jailable offenses, the Municipal Court has been violating the Sixth Amendment right of indigent defendants to have lawyers appointed to represent them. In considering the government’s duty to appoint attorneys, the Supreme Court has drawn the line at “actual imprisonment.” Thus, when a prosecution results in only a fine, the Court has held that the Sixth Amendment does not require appointment of counsel. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979). For that reason, apparently, the Colorado Springs Municipal Court tells defendants that they are not entitled to appointed counsel when they are charged only with a non-jailable offense. On the other hand, the Supreme Court has made it clear that the Sixth Amendment is violated whenever indigent defendants are sent to jail as a result of a conviction in a case in which they were denied an appointed lawyer. *Alabama v. Shelton*, 535 U.S. 654, 661 (2002). Thus, the Municipal Court violates the Sixth Amendment when it refuses to appoint an attorney for an indigent defendant, enters a conviction, and then sends the defendant to jail on a “pay-or-serve” sentence. We have reviewed transcripts in which the Municipal Court denies a defendant’s request for appointed counsel because – as the judge explains – the offense is non-jailable. Then, in the very same hearing, the judge enters a conviction and sends the defendant off to jail on a pay-or-serve sentence. This practice violates the Sixth Amendment.

A case study: multiple consecutive jail sentences imposed for a nonjailable offense on a homeless man who did not violate municipal law.

The Colorado Springs Municipal Court often compounds the egregiousness of its illegal practice of jailing debtor-defendants for non-jailable offenses by imposing multiple consecutive sentences when impoverished defendants have more than a single citation. A single non-jailable offense carries a maximum fine of \$500, which would “convert” to a maximum 10-day lockup at the City court’s “rate” of \$50 per day. By imposing *consecutive* “pay or serve” sentences, the Municipal Court has sentenced penniless defendants to weeks and months of jail at a time—for supposedly “non-jailable” offenses.

The gross injustice of these *consecutive* pay-or-serve sentences is accentuated in the case of defendants charged with violations of Section 10.18.112, “Soliciting Near Street or Highway.” Just one example is the case of a forty-five-year-old homeless man who has been locked up more than ninety days of the past year on pay-or-serve sentences solely for violations of Section 10.18.112. This ordinance addresses solicitation near streets or highways, and it expressly excludes solicitation carried out by displaying a sign inviting charity. In other words, passive solicitation, such as merely holding a sign, does not violate the ordinance. We have reviewed the multiple citations this homeless man received, and the narrative portions clearly show that he did not violate the ordinance – he was simply soliciting donations by displaying a sign inviting charity. Nonetheless, over and over again, the Colorado Springs police cited him, and the Colorado Springs Municipal Court entered uncounseled convictions and fined him for violating an ordinance that he was not violating.⁷

⁷ On September 14, 2015, the ACLU wrote to you regarding the City’s illegal enforcement of Section 10.18.112 against passive solicitors. We estimated that over ninety percent of the citations and convictions for violations of Section 10.18.112 were for passive solicitation and were, thus, illegal. Now we know that many of the individuals

When this man was unable to pay his fines, the Municipal Court converted his sentences into jail time, ordering that his debt to the court be credited at a rate of \$50 per day of incarceration. The court knew this man was homeless, jobless, and deeply impoverished. The charging documents, the defendant's conversations with the judge,⁸ and the fact that he had been repeatedly charged with panhandling by the side of the road could have left no doubt in the court's mind. Yet, from December 2014 to September 2015, this man was jailed four times to serve off fines for a total of twenty-six separate Section 10 charges, with sentences ranging from 1 day to 10 days, *to be served consecutively*. **All told, during the course of the last year, this homeless man, who had not even violated the ordinance for which he was repeatedly charged, convicted and fined, has served nearly 100 days in jail for a non-jailable offense, solely because he was too poor to pay court-ordered fines.**⁹

There are many similar examples. In our letter of September 14, 2015, we estimated that over ninety percent of the City's citations and convictions for violations of Section 10.18.112 were for passive solicitation that did not violate the ordinance. Since January 2014, the Colorado Springs Municipal Court has imposed over 200 pay-or-serve sentences for a violation of Section 10.18.112. These individuals were not only illegally sentenced to jail because they were too poor to pay a fine, but in more than ninety percent of the cases, the fine itself was imposed for innocent conduct that did not violate municipal law. The City must end these unjust and illegal abuses of power.

There are important policy and fiscal reasons to ensure defendants are not jailed simply because they are too poor to pay their debt.

Beyond the legal prohibitions, there are many fiscal and policy reasons why poor people should not be incarcerated when they cannot pay a debt. Incarcerating the poor for their inability to pay creates a two-tiered system of justice in which the poorest defendants are punished more harshly than the ones with means. Defendants who can write a check move on with their lives. Those unable to pay are imprisoned. In a system committed to equal justice for all, accountability cannot mean that people of means pay fines, while the poor go to jail.

Jailing an indigent defendant does nothing to advance the City's interest in collecting fines and, in fact, wastes taxpayer money and resources. Imprisoning an impoverished person for debt does not get the fine paid. Indeed, there is net *loss* to the taxpayer when a jail imprisons a defendant at a cost of more than \$60 a day¹⁰ in order for that defendant to "pay off" his fine. This system lacks fiscal sense: when the Colorado Springs Municipal Court unconstitutionally converts fines into jail sentences, it not only loses the chance to recoup any of the defendant's fine, but also expends taxpayer money to house that defendant in jail. Taxpayers spent over \$5,000 to jail the homeless man whose 90+ days of incarceration on consecutive pay-or-serve sentences was described earlier. Imagine if those resources could have been devoted instead to providing services.

illegally cited and convicted for passive solicitation were jailed when they were unable to pay court-ordered fines for conduct that did not violate the ordinance.

⁸ We have reviewed transcripts of the proceedings in which this man received "pay-or-serve" sentences on December 29, 2014, and January 20, April 28, and September 8 of this year.

⁹ This man's four separate incarcerations are documented in El Paso County Jail files for booking numbers 1500016259, 1500011649, 1500006143., and 1400021823.

¹⁰ The El Paso County Jail reports its daily cost to house an inmate is \$62.50.

Colorado Springs must set a new course in how its criminal justice system interacts with persons experiencing extreme poverty.

This letter identifies only one more in a series of terrible missteps by the City in its treatment of people experiencing homelessness and poverty. Today's letter, along with the facts we brought to light in our letter of September 14th, shows that no arm of Colorado Springs' criminal justice system has been respecting the legal limits of its authority, at least when it comes to poor and homeless people, who are often without adequate resources, knowledge or legal counsel to protect their own rights. We ask the City to set out on a new course in how its police, prosecutors, and municipal court interact with persons experiencing extreme poverty.

In that spirit, we urge the City of Colorado Springs to shelve its proposed sit-lie ordinance, a measure that targets the same population that is already victimized by the City's illegal pay-or-serve sentences for minor ordinance violations. In an effort to make the proposed sit-lie ordinance more palatable to members of the public who objected to the harsh penalty proposed initially, the City now proposes to make the first offense punishable by a fine only. As today's letter explains, given the current illegal sentencing practices of the City's municipal court, the promise of a non-jailable offense is a false promise. In Colorado Springs, poor persons convicted of non-jailable offenses are regularly and frequently sentenced to jail, *because* they are poor. It is time for a dramatic change.

To comply with federal and state law, Colorado Springs Municipal Court must undertake significant changes in policy and practice.

The City of Colorado Springs must take responsibility for stopping and correcting the illegal sentencing practices of the City's municipal court. Indeed, it appears that a City ordinance actually purports to authorize the Municipal Court to convert fines to jail time, at a daily rate set by the presiding municipal judge, when a defendant fails to pay a fine.¹¹ The City must repeal these portions of its Municipal Code.

In addition, in order to stop violating federal and state law, Colorado Springs must take immediate proactive measures to ensure that the City's court stops jailing poor people when they are unable to pay fines, particularly when the underlying offense is non-jailable. To comply with the law, Colorado Springs must immediately:

- (1) Mandate that all judges of the Colorado Springs Municipal Court permanently cease imposing "pay or serve" sentences, or any other sentence that converts fines to jail time.
- (2) Adopt a policy ensuring that no one is incarcerated for or because of failure to pay a fine absent:
 - a. a hearing on indigency,

¹¹ See Colorado Springs Municipal Code, Sections 11.2.103 (I) and 11.3.106(A), (B).

- b. a judicial determination that the individual is in contempt of court for willful failure to comply with the court's order to pay, and
- c. the provision of all procedural protections mandated in Supreme Court precedent and C.R.S. § 18-1.3-702.

Finally, to fully take responsibility for its constitutional violations, the City must create a fund dedicated to providing reasonable per-day compensation to those individuals who have served time on a pay-or-serve sentence for a non-jailable offense. It is beyond dispute that the City – through the illegal sentencing practices of its municipal court – has violated the constitutional rights of each of these individuals.

We ask that you respond to this letter no later than November 5, 2015.

Sincerely,



Mark Silverstein
Legal Director, ACLU of Colorado



Rebecca Wallace
Staff Attorney, ACLU of Colorado

cc: Hon. HayDen Kane II, Presiding Judge, Colorado Springs Municipal Court, by email to - smartinez2@springsgov.com

Anne H. Turner, Colorado Springs City Attorney's Office – aturner@springsgov.com